No. 88-84

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MAURICE JOHN,
Petitioner

v.

CITY OF SALAMANCA and NORRIS STONE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

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1. We think Respondents have actually reinforced the reasons why this Court should take this case. At page 6 Respondents state that the District Court's decision was not adopted by the Second Circuit and so, they claim, our assertion that the District Court's ruling—that 25 U.S.C. § 233 establishes state civil regulatory jurisdiction over Indians—remains in force, is "hyperbole." Opp. at 6. Yet at page 12 Respondents state New York has full jurisdiction over Indians in New York, citing as authority none other than 25 U.S.C. § 233! Opp. at 12. The footnote at page 13 reiterates the importance of § 233 by

arguing that the District Court's construction of § 233 be affirmed by this Court.

Petitioner's fears are far from "hyperbole." In its brief, the City has clearly asserted its civil regulatory authority as emanating from § 233. This assertion of authority is clearly wrong and is at odds with this Court's decision in *Bryan v. Itasca County*, 426 U.S. 373 (1976). *See* Petitioner's Brief at 20-26.

Respondents' reliance on the *Forness* case also leads this Court head on into the § 233 issue. The *Forness* decision, which held the state had no jurisdiction over Indians under the 1875 Act, *was the very reason for the passage of § 233! See United States v. Forness*, 125 F.2d 928 (2d Cir. 1942). This is the very reason we say § 233 superceded the 1875 Act. Pet. at 18-20.

2. Respondents' position, if accepted, means that the Seneca Nation and the Allegany Reservation are to be treated differently than every other tribe and reservation in the country. Unlike even those tribes expressly subject to state jurisdiction under Public Law 280, it is only the Seneca Nation (and other New York tribes) that are being subject to full state regulatory authority under the guise of § 233. It is only the Allegany Reservation that has been singled out as being without any authority over Indians and Indian land within a city located on a reservation.[1]

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[1] The following is a partial list of non-Indian towns located partly or wholly within reservations:

Arizona: Parker (pop. 2542), Colorado River Res.; *California*: Palm Springs (pop. 32,271), Rancho Mirage (pop. 6281), Cathedral City (pop. 3640), all on Agua Caliente Res. *Idaho*: St. Maries (pop. 2794), Couer D'Alene Res.; Lapwai (pop. 1034), Nez Perce Res. *Michigan*: Mount Pleasant (pop. 23,746), Saginaw Res. *Minnesota*: Prior Lake (pop. 7284), Shakopee Mdewakanton Res. *Montana*: Browning (pop. 1226), Blackfeet Res.; Wolf Point (pop. 3074), Fort Peck Res. *North Dakota*: New Town (pop. 1335), Parshall (pop. 1059) both on Fort Berthold Res. *South Dakota*:

A myriad of cases have recognized that the mere establishment of a non-Indian town on a reservation does not displace tribal authority over Indians and does not grant the town jurisdiction over Indians living within the community. *See, e.g., Buster v. Wright,* 135 F. 947, 952 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906), *cited with approval in Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 141 (1982); *Shakopee Mdewakanton Sioux v. City of Prior Lake,* 771 F.2d 1153 (8th Cir. 1985); *Chase v. McMasters,* 573 F.2d 1011 (8th Cir. 1978); *Segundo v. City of Rancho Mirage,* 813 F. 2d 1387, 1391 (9th Cir. 1987).

If for no other reason than to correct this inequitable situation that abrogates the Seneca Nation's tribal sovereignty, the petition for certiorari should be granted.

3. Another contention of Respondents (Opp. 8-12) is that because the City and State have historically exercised jurisdiction over Indians without challenge, this is evidence that such exercise of jurisdiction is correct. Respondents call this the "subtle authority of expediency." Opp. at 12.[2] However, "expediency" is hardly a

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Mission (pop. 748), Rosebud Sioux Res. *Washington*: Omak (pop. 4007), Coulee Dam (pop. 1412), Colville Res.; Tacoma (pop. 158,501), Puyallup Res.; Toppenish (pop. 6517), Wapato (pop. 3307), Grandview (pop. 5615) all on Yakima Res. Of the States named, California, Idaho, Minnesota and Washington have significant Public Law 280 jurisdiction on Indian reservations.

[2] Respondents rely on Opinions of the Attorney General (we assume the State's Attorney General) concerning the exercise of state jurisdiction. These opinions were all written prior to the enactment of 25 U.S.C. § 233 in 1950 where Congress specifically defined the extent of state jurisdiction. This statute did change prior practices in the exercise of jurisdiction in New York. *See* Cohen, Handbook of Federal Indian Law 372-373 (1982 ed.). And § 233 has never been construed by this Court to determine the extent of that jurisdiction.

Likewise, Respondents rely on *People v. Dibble,* 62 U.S. (21 How.) 149 (1859) as justification for the State's exercise of jurisdiction

legitimate basis for the assumption of state jurisdiction over Indians—the rule is that only clear congressional consent can serve as a basis for state jurisdiction. The argument as to historic exercise of jurisdiction was implicitly raised in *Mattz v. Arnett*, 412 U.S. 481, 484-485 (1973), but this Court was not persuaded that past practices without more could justify the exercise of state jurisdiction.

Indeed, if Respondents' argument were persuasive, this country would still be practicing school segregation.

4. Respondents' analysis of our use of *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) completely misses the mark. Opp. at 7. We do not contend the building permit is a tax. It is the analysis of successive statutes that was made in *Blackfeet* that is relevant. Our previous brief sets forth this reasoning at 18-20. We will not rehash it here.

Respondents also contend that since Congress specifically foreclosed the applicability of certain state laws to Indians, such as state tax laws, this shows an intent that all other state laws must apply. Opp. at 7. This same argument was made concerning Public Law 280, which sets forth specific exceptions to the application of state civil laws. This Court rejected that argument in *Bryan* and should do so here. *Bryan*, 426 U.S. at 378-79.

The fact of the matter is that Respondents have not refuted any of our arguments concerning the 1875 Act or § 233. Respondents have simply baldly asserted that ju-

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over New York Indians. But their interpretation of *Dibble* is incorrect since it addresses laws passed to protect Indians from intrusion by non-Indians. Regardless of what *Dibble* says, even if Respondents' reading is correct, *Dibble's* precedential value is limited by this Court's more recent rulings protective of Indians from state interference. *See, e.g., McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

risdiction does exist. This Court should not leave the issue in the clouds.

Petitioner requests that the petition for certiorari be granted.

Respectfully submitted,

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